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Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

FARHAD SOROUSHIRN,

Defendant-Appellant.

Case No.
14421

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SECOND
JUDICIAL DISTRICT COURT, IN AND FOR
WEBER COUNTY, STATE OF UTAH, THE
HONORABLE RONALD O. HYDE, JUDGE,
PRESIDING

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FILED

SEP 16 1977

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

FARHAD SOROUSHIRN,

Defendant-Appellant.

Case No.
14421

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with possession of a controlled substance, to-wit: marijuana, a misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and was found guilty on December 15, 1975, in the Second Judicial District Court, the Honorable Ronald O. Hyde, presiding. On December 15, 1975, the trial court fined appellant \$100.00.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment of the jury and the fine of the trial court.

STATEMENT OF FACTS

On July 2 and 3, 1975, Mr. Djafar Tawakoli, a former Persian student at Weber State College, made arrangements for terminating his tenancy of apartment No. 119 at the Warren House Apartments in Ogden City, Utah (Tr.20-32,94-99,102-105, 109,111-113). Beth Weinle, then assistant manager of the apartment house, testified that on July 2, 1975, Djafar checked out of his room by giving her two keys to his room: one mail box key and one door key. At that time, she testified he told her he was moving out (Tr.21-24,27,28). Although Mr. Tawakoli denied turning in his door key on July 2, 1975, he did testify that on that date he went to the manager's office, turned in his mail box key and paid the assistant manager \$12.00 rent for the last two days he resided in room 119 (Tr.97,104,111-113).

Ms. Weinle, the assistant manager, testified she then told the maid to go to room 119 and clean it (Tr.23). She was unclear as to exactly which day the maid did clean (Tr.24,26,27,29), although the maid testified she thought she first went to the room on July 3, 1975 (Tr.38). Geraldine Brown, the maid, stated when she went to the apartment, she noticed that there were some personal items in it, so she relocked the door and informed the assistant manager, Ed Weinle, of the situation (Tr.33,34). The manager of the apartments, Donna Merryman, later that day instructed Ms.

Brown to return to the apartment and inventory the items according to the standard procedure when a former tenant leaves items behind (Tr.34).

During this inventory, Ms. Brown testified they found a plastic bag which looked "awful funny" and a cloth bag which also aroused her suspicions (Tr.34,35,40,41). She further testified that the manager told her to find the police officers who also lived in the apartment house, which she did, leaving the bags on the kitchen counter (Tr.35,36,41). She and the two officer returned shortly, she testified, and then she left (Tr.36,37,41).

Joseph William O'Keefe, a patrolman with the Ogden City Police Department, testified that he and his roommate James Robert McKinley, went with Ms. Brown to room 119 where he opened a plastic baggie and opined that it was "definitely marijuana." (Tr.42-44,52). O'Keefe testified he learned from Mrs. Merryman that the apartment had been vacated by a Persian student who had just left for Persia (Tr.44). He stated he then searched the apartment, discovering yet another plastic bag containing what he believed to be marijuana (Tr.44,45,54,55,56). O'Keefe testified he put the bags on the counter along with the cloth bag whose contents he could not identify, and then went to call the Ogden City Police Department

Narcotics Squad (Tr.45). While he was doing so, he testified Jerry Merryman came to tell him that persons unknown to him were removing items from apartment 119 and placing them in a vehicle in front of the apartment (Tr.46). According to his testimony, O'Keefe approached one of the men coming down the stairway and asked him what he was doing, to which the man responded that he was helping a friend move and that his friend had returned to Persia (Tr.46). O'Keefe said that he and Mr. Merryman then went up to the apartment where he saw the man identified as the appellant, Farhad Soroushirn, inside the room (Tr.46,47). When asked by O'Keefe what he was doing there, the appellant responded that he had come to pick up his friend's possessions (Tr.47). At that point, the officer testified Mr. Merryman indicated that the "stuff's gone" (Tr.47,48), whereupon O'Keefe observed that the two plastic baggies had been removed from the counter (Tr.48). O'Keefe testified that he asked both men what happened to the marijuana, to which they both responded "they had no idea what we were talking about, that they had not seen any marijuana." (Tr.48). According to his testimony, O'Keefe identified himself as a police officer and gave them the Miranda warning, taking time to explain each portion of it to them (Tr.48,58). O'Keefe testified he told them they were trespassing at which point the other

person stated he had not entered the apartment, "that Mr. Soroushirn was loading the boses (sic) and personal items up and placing them in the hall, and that the other gentleman was taking them from the hall and transporting them to the car, and Mr. Soroushirn agreed with that statement." (Tr.49).

O'Keefe testified he then asked the appellant and the other man to return all the items to the apartment house that had been placed in the vehicle. He then called for a patrolman. Officer Soakai, the patrolman, responded to the call. After Mr. O'Keefe signed a citizen's complaint against the appellant, Officer Soakai read the Miranda warning to him (Tr.91) and took him to the police station (Tr.79).

James Robert McKinley, a reserve police officer and state liquor narcotics agent at the time of this incident, testified that he went with Officer O'Keefe to room 119 when called by Ms. Brown, and that he left the apartment temporarily while Mr. O'Keefe had gone to call the police, returning to find O'Keefe talking with the appellant and his partner (Tr.67,68). After he was informed that the baggies were gone, he testified he started to look for them, eventually finding them enclosed in the cavity of a tape recorder in a box in the apartment

(Tr.68,69,70). According to McKinley's testimony, when he asked the appellant if he knew whose tape recorder it was he denied owning it (Tr.69).

Two days later, according to Mr. McKinley, while he was doing some maintenance work for Warren Apartments, the appellant approached him asking, "Why did you do this to me, brother? or something like that." (Tr.71). McKinley said he answered "because it's my job" (Tr.85) and that if the appellant had at first been truthful, the matter may not have gone as far as it did. The appellant responded, "Well, if I had of told you the truth then I would have got in trouble," according to Mr. McKinley and further indicated that the tape recorder was his but he had loaned it to his friend (Tr.72,85,87-89).

The appellant then stated he did not own the marijuana but admitted putting the marijuana in the back of the tape recorder, according to Mr. McKinley's testimony (Tr.73-74).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY ADMITTED THE INCRIMINATING TESTIMONY OF WITNESS JAMES ROBERT MCKINLEY.

In the pretrial hearing on the date of his trial, the appellant moved to suppress incriminating statements made

to one of the State's witnesses, James Robert McKinley, one of the two men called to room 119 by the maid of the Warren Apartments to look at the suspicious looking items discovered therein. This motion was argued and subsequently denied by the trial court (Tr.4-16), and later renewed and reargued by the appellant when the jury retired to determine the verdict, again denied by the trial court (Tr.132-137).

Appellant contends that the state has the burden of showing that incriminating statements were voluntarily given before they are admissible, relying on State v. Dunkley, 85 Utah 546, 39 P.2d 1097 (1935). In Dunkley, the Utah Supreme Court held that the State has the burden of showing the voluntariness of a confession before determining its admissibility. In the case at bar, the incriminating statements made to Mr. McKinley fail to constitute a full-blown confession but respondent will discuss the case regardless because it supports the trial court's ruling. Dunkley requires that where there is a question as to the voluntariness of statements, a hearing should be held before the court in the absence of the jury to determine the issue. In the instant case, this hearing was held pursuant to the motion to suppress made by the appellant (Tr.4-61 and renewed 132-137). Several pages of argument and testimony satisfied the Dunkley burden on the prosecution. Appellant claims that Mr. McKinley

"concealed" his identity as a reserve officer in an attempt to "coerce, confuse, deceive and trick" him. Appellant further claims that because of Mr. McKinley's actions he did not voluntarily give his statements because he did not voluntarily waive his right not to speak.

Quite to the contrary, the record is replete with testimony that Mr. McKinley did not try to "conceal" his identity or in any other way attempt to "coerce, confuse, deceive or trick" the appellant. Mr. McKinley testified that he recalled informing the appellant of his identity when the appellant approached him two days after his arrest (Tr.77,85). Further, Mr. McKinley in no way misrepresented his position to the appellant because it was he who made the citizen's arrest and the appellant knew this, thereby aware that Mr. McKinley was not disposed towards him. Moreover, this was not Mr. McKinley's investigation; in fact, he was off duty at the time of this incident, he being assigned to undercover work in Southern Utah (Tr.74-75). He and O'Keefe were asked to the apartment but they were off duty and assisted only until the on-duty officer arrived.

Although it is true that Mr. McKinley did not give the appellant a Miranda warning (Tr.77), the appellant was advised of his rights by two different individuals when he was arrested, first by Mr. O'Keefe (Tr.48,58), and then by Officer Soakai (Tr.91). When asked if he understood the

Miranda warning given and explained to him, the appellant stated that he did (Tr.49,58). Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), dealt with the problem of police-custodial and police-dominated interrogations, holding that where a suspect has been taken into custody or is in a police-dominated atmosphere, the police may not use any statements made by the suspect in the absence of procedural safeguards to secure the Fifth Amendment's privilege against self-incrimination. The United States Supreme Court further held that these procedural safeguards are necessary to ensure that any statement made was truly the product of the suspect's free choice and not compelled by the atmosphere of the custodial interrogation itself:

" . . . the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other full effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity

to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." 436 U.S. at 444, 445.

The cases decided in the Miranda decision all shared salient features--"incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in incriminating statements without full warnings of constitutional rights." Id. at 445.

The case at bar is clearly distinguishable from the cases before the Court in Miranda. Here, the appellant was advised of his constitutional rights not once but twice. Even if appellant should argue what constituted his custody, he cannot escape the fact that Mr. O'Keefe advised him of his

rights as soon as it became apparent the appellant might be in possession of the marijuana. Moreover, appellant was given the Miranda warning a second time when he was arrested and taken into custody by Officer Soakai. Appellant's contention that Mr. McKinley's failure to give the appellant an additional Miranda warning overlooks the fact that the Miranda decision does not require every person talking with the suspect to individually and separately advise him of his rights. Further, Mr. McKinley testified that he did not feel obligated to give the Miranda warning (T.77) only reinforces his viewpoint that he was not conducting an investigation but that he was merely giving off-duty assistance in a situation that demanded his aid. Mr. McKinley was present when Mr. O'Keefe advised the appellant of his rights so he knew that the appellant had been apprised of his constitutional protections (Tr.77).

Appellant argues that the statements the appellant made to Mr. McKinley two days after his arrest should also have been suppressed on various grounds including that the statements "stemmed" from the original custodial interrogation and that somehow Mr. McKinley was misrepresenting his interest in the case. These arguments are bankrupt for several reasons: (1) Miranda v. Arizona, supra, concerns custodial or police-

dominated atmosphere. In this case, the record reveals that the second encounter between Mr. McKinley and the appellant occurred at the Warren Apartments and were initiated by the appellant. This is clearly not the kind of atmosphere considered in Miranda.

(2) In two recent decisions, the Utah Supreme Court has addressed the question of what to do in the situation in which a suspect states he wants to remain silent but then reinitiates conversation with the police and makes incriminating statements. In State v. Easthope, 29 Utah 2d 400, 510 P.2d 933 (1973), this Court decided that where a defendant had first stated he did not want to make a statement and that he wanted to see a lawyer and then asked the reason for his arrest, the incriminating statements he made following the policeman's answer were not protected because he had voluntarily made the statements after having been informed of his rights.

State v. Sims, 30 Utah 2d 251, 516 P.2d 354 (1973), discusses a similar situation: the defendant called an attorney but nevertheless told the officers to "go ahead" with their questions, thereby waiving his privilege by voluntarily answering their questions.

(3) There is some testimony that Mr. McKinley informed the appellant of his occupation as reserve police officer and state liquor narcotics agent at this time, so it is difficult to see how Mr. McKinley "misrepresented his interest."

(4) At no point in the record is there any indication that at this meeting Mr. McKinley asked the appellant questions over his protest or against his wishes (Tr.71-74,82-86,87-89).

Finally, appellant contends that both his broken English and Mr. McKinley's failure to make a written report of what transpired should have been enough to justify exclusion of his testimony. This contention ignores the fact that although English is not the appellant's native tongue he was at the time of this incident a student at Weber State College (Tr.113) and attended classes taught in English. Moreover, although it might have proved helpful had Mr. McKinley made a report of this incident, he was under no obligation to do so. His recollection of exact phrasing or lack thereof was a consideration for the jury as it always is in weighing the credibility of witnesses. Certainly an imperfect memory of a witness is no reason for excluding his testimony altogether.

Respondent submits that the trial court correctly

admitted the testimony of witness McKinley.

POINT II

THE TRIAL COURT PROPERLY ADMITTED THE BAGS OF MARIJUANA INTO EVIDENCE.

On the day of this incident, Messrs. O'Keefe and McKinley were called by the manager of the Warren Apartments to come and help them determine the contents of the suspicious looking bags in room 119. When they arrived they observed the plastic bag on the countertop in the room. Only after determining it was marijuana did they look around the room for more contraband.

Appellant cited Mapp v. Ohio, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961), as authority for his claim that this evidence should have been suppressed. Mapp stands for the proposition that evidence obtained by unconstitutional searches and seizures is inadmissible at trial in a state court. Respondent has no quarrel with the soundness of this proposition but maintains it does not apply under the facts of this case. Respondent submits that there was no illegal search and seizure of evidence because there was no search and seizure in the first place.

According to State v. Simpson, 541 P.2d 1114 (Utah 1975), the Utah Supreme Court is "obliged to view the evidence, and whatever inferences may be fairly and reasonably drawn therefrom. . . ." Id. at 1115. Applying this doctrine to the instant case, it is clear that Djafar Tawakoli paid rent for the last two days he was there, July 1 and July 2, 1975, and that he left for Persia July 3, 1975, in the morning. Further, there is evidence that he turned in some keys when he paid the assistant manager his two days' rent on July 2, 1975. Thus, having paid only two days' rent, he gave up possession of the room at the end of July 2, 1975. Although some of his possessions remained in the room, he had no "possessory rights" to the apartment for himself or to transfer to the appellant or anyone else, as appellant claims. Therefore, it was not improper for the manager of the apartment to enter the room and inventory those items left behind. Djafar had given up his tenancy to it. When the maid discovered the plastic baggie she put it on the countertop and went to get the two officers in the building. Furthermore, the first time McKinley and O'Keefe saw this plastic bag it was in plain view. According to State v. Allred, 16 Utah 2d 41, 395 P.2d 535 (1964), where an item is observed in plain view, no search is made by observing it. "Under such circumstances, where no search is required the constitutional

guaranty is not applicable." Id., 16 Utah 2d at 43, 395 P.2d at 537. See also State v. Sims, 30 Utah 2d 251, 516 P.2d 354 (1973). Also, the Utah Supreme Court in State v. Martinez, 28 Utah 2d 80, 498 P.2d 651 (1972), held that where there was a seizure of that which is in plain sight, there is no search.

Therefore, Officer O'Keefe and Mr. McKinley did not make any search at all of the first bag of marijuana. Respondent submits that there was no search for this marijuana because it was in plain view and because the two men were there by invitation of the manager who had lawful possession of the apartment as of July 3, 1975, a fact supported by the appellant's own testimony.

As to the second bag of marijuana, it was properly introduced into evidence also because the search for it was permitted by the manager of the apartments, the person in lawful possession of the room, and because Mr. O'Keefe was obligated to do so in view of the fact that the presence of the known contraband raised suspicions about the rest of the items left in the room. In other words, even had the manager not been in lawful possession of the apartment, Officer O'Keefe would have been obligated to investigate suspicious circumstances. Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889,

Finally, the search for the marijuana after it had been removed from the counter in O'Keefe's and McKinley's absence is also permissible under Terry v. Ohio, supra, because it was clear that someone had taken possession of the contraband, an unlawful act which required immediate investigation.

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the light most favorable to the jury verdict. State v. Berchtold, 11 Utah 2d 208, 351 P.2d 183 (1960); State v. Danks, 10 Utah 2d 162, 350 P.2d 106 (1959). In other words, unless there is a clear showing of unreasonableness, the decision of the lower court must be affirmed. State v. Romero, 554 P.2d 216 (Utah 1976).

Respondent submits that the contraband was properly and permissibly seized and was properly admitted into evidence by the trial court.

CONCLUSION

WHEREFORE, based upon the arguments and authority presented herein, it is urged that this Court affirmed appellant's conviction.

Respectfully submitted,

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